No. 10,525

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHAN CHAUN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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APPELLEE'S QUESTION.

Replying to the question raised by the appellee, "Is the evidence sufficient to sustain the verdict of the jury?", appellant will briefly present to the court reasons for reply in the negative.

With a view to avoiding a confusion of the facts, we invite the court's attention first to the evidence offered in support of the indictment returned in the Northern Division of the Northern District of California and upon which a verdict of guilty was returned.

THE INDICTMENT IN THE NORTHERN DIVISION.

On the first day of December, 1942, an inspector of the Department of Agriculture of the State of Cali-

fornia discovered on a Greyhound bus at Hornbrook, California, a suitcase containing some newspapers, magazines and twelve tins containing opium. It is claimed that the suitcase was checked in the baggage room of the Greyhound Bus Depot in Portland. There was a baggage check attached to the suitcase. Federal Narcotic Agents met the bus at Davis, California and removed the twelve tins of opium from the suitcase and returned the suitcase to the bus for delivery to the baggage room of the bus depot in San Francisco.

On December 9, 1942, Timothy Leong, a truck driver, called at the Greyhound Bus Depot and presented a baggage check corresponding in number to that attached to the suitcase, for the purpose of securing the baggage for delivery. He was thereupon confronted by Federal Narcotic Agents, who questioned him relative to the baggage check. Leong said he received the check from his employer, the Canton Express Company, with instructions to deliver the suitcase to the Hing Wah Tai Company at 717 Grant Avenue.

Frank Dun, the proprietor of the Canton Express Company, when questioned, stated he received the check from Pon Wai, one of the partners of the Hing Wah Tai Company, and Pon Wai, also a witness for the Government, testified that he first saw the check on his desk; he does not know who put it there, but the appellant told him to have the baggage represented by the check picked up and at that time there were two or three strangers present. Appellant at all times denied ownership of the baggage and stated he

instructed Pon Wai to have the baggage picked up as an accommodation to one of the strangers, which is not the unusual in his business.

THE INSUFFICIENCY OF EVIDENCE.

Appellant contends: First, there is no proof that appellant ever had possession of the baggage check or the baggage; Secondly, there is no proof that appellant had any knowledge of the contents of the suitcase; Thirdly, there is no proof that appellant concealed or facilitated the concealment of opium.

This court, as well as the courts of other circuits, have held such proof to be indispensable. In *Ching Wan v. United States,* 35 Fed. (2d) 665 (9th Cir.) this court used the following language:

> "It was not shown that he had any knowledge of the contents of the box transported by him or of the criminal purposes of the other parties."

And in *Kalos v. United States,* 9 Fed. (2d) 268 (8th Cir.) the court said:

> "Knowledge by defendant that morphine was in the package is an element of the crime, made so by statute. Even without the statutory requirement it would have been necessary to prove that knowledge before the case could be properly submitted to the jury. *Baender v. Barnett,* 255 U.S. 224, 41 S. Ct. 271, 65 L. Ed. 597."

THE INDICTMENT IN THE SOUTHERN DIVISION.

The appellant was found guilty of the offenses charged in the third and fourth counts of the indictment returned in the Southern Division of the United States District Court, for the Northern District of California, the third count charging the concealment and facilitating the concealment of smoking opium contained in three jars, the quantity of which was one ounce and 184 grains; the fourth count charging concealment of 220 grains of yen shee. The above described narcotics were found in a kitchen on the third floor of the building at 717 Grant Avenue, San Francisco. These are the premises maintained and operated by the Hing Wah Tai Company, engaged in the importing and exporting business.

Inspector John J. Manion, in charge of the Chinatown Squad of the San Francisco Police Department, testified that he is quite familiar with the premises known as 717 Grant Avenue; that it is a three story building with a frontage of approximately 25 feet and a depth of 50 feet; that there is merchandise contained in the various floors of the building and a freight elevator used therein; that at the extreme rear of the building there is a kitchen (Tr. p. 50) and at the front of the building, on the third floor, there is a room which is occupied by the appellant. (Tr. p. 49.)

A Federal narcotic agent discovered certain jars in the kitchen which, while they contained no narcotics, aroused his suspicions and caused him to search and upon a further search a small quantity of opium, as well as yen shee was found in the kitchen.

It appears that the first person questioned with reference to the opium and yen shee found in the kitchen was Pon Yin Jeung, a Chinese cook, whose duties were to prepare the food for all of the persons engaged in the business of the Hin Wah Tai Company on the premises; that Pon Yin Jeung not only performed the duties of his employment in the kitchen, but lived on the premises, as did the appellant, Chan Chaun, Lee King, a bookkeeper, and a Chinese employee by the name of Mah Hoy, the porter. It also appears from the testimony of Pon Yin Jeung that not only the four persons named, but all of the employees of the business had free access to the kitchen, where the opium and yen shee were found. It is contended, however, that Pon Yin Jeung stated, in the presence of the appellant, that the narcotics found in the kitchen belonged to the appellant and that when this statement was made appellant neither admitted, nor denied the accusation.

It will be noted that no opium nor other contrabrand was found in the premises occupied exclusively by appellant. While it is claimed by the Government witnesses that the cook stated that the opium and yen shee found in the kitchen belonged to appellant, the cook testified that he made no such statement, but simply said to the agents in response to their inquiry as to who owned the opium and yen shee, "ask him", pointing to appellant. Appellee thereupon points out that Pon Yin Jeung is not to be believed, for the reason that other Government witnesses testified that they conversed with the witness in the English lan-

guage without difficulty, but that he, the said Pon Yin Jeung, testified positively that he did not at any time converse with the witnesses in English and could not talk in any language other than Chinese. The appellee in discounting the testimony of Pon Yin Jeung disregards the fact that he is a witness called by the appellee, whose testimony, for what it is worth, was adduced for the purpose of proving appellee's case against appellant. Obviously Pon Yin Jeung, whose duties require his almost constant occupation of the kitchen, wherein the narcotics were found, would not claim ownership of them.

THE EVIDENCE IS WHOLLY INSUFFICIENT.

It is the contention of appellant that the evidence is wholly insufficient to sustain the verdict of guilty for the following reasons:

First: The only evidence offered to support the conviction of the appellant was the alleged accusatory statement of the cook, who was constantly engaged in the kitchen where the narcotics were found.

> "Obviously, the out of court accusation made by the Nicholsons was not evidence of the truth of that accusation. When an out of court accusation is made, it is not the accusation, but the conduct of the accused that is evidence, and the accusation is merely admitted to explain the conduct of the accused. Where the accused denies the accusation, the accusation should not be admitted at all, unless admissible on other grounds." (Citing cases.)
>
> *People v. Zoffel,* 35 Cal. App. (2d) 215 at 223.

"* * * the testimony of the arresting officer referring to a conversation had with defendant White's wife was admitted as follows: 'Q. Did you later have a conversation with her in the presence of the defendant White? A. Yes. Q. And what was said at that time? A. In the presence of the defendant? Q. Yes. A. One of the accompanying officers asked the young lady if she was the defendant White's wife. She said she was not.' * * *

"The foregoing will serve as examples. Apparently the trial court was under the impression that the presence of the defendant alters the character as hearsay of the statements and declarations of others. Such is not the rule.

"Manifestly, statements made by others outside the presence of the defendant are clearly hearsay. Statements made by others are no less hearsay when made in the presence of a defendant. The so-called exception to the rule permitting the introduction of evidence of accusatory statements made to the accused may account for the confusion that appears to exist somewhat generally. Evidence of accusatory statements, however, may be received for but one purpose, namely, as the basis for evidence of the conduct of the accused in the face of such accusations. (People v. Shellenberger, 25 Cal. App. (2d) 402 at 408; People v. Teshara, 134 Cal. 542 at 544; People v. Philbon, 138 Cal. 530 at 532; People v. Weber, 149 Cal. 325 at 338; People v. Ah Yute, 54 Cal. 89; People v. Ayhens, 16 Cal. App. 618 at 623.) Although often referred to as an exception to the rule, the foregoing doctrine, it would seem,

emphasizes and confirms the rule and is in entire accord therewith, rather than an exception."

People v. White, 44 Cal. App. (2d) 183 at p. 185.

To the same effect:

Autrey v. State, 114 So. 244 at 245-6;

Commonwealth v. Karmendi, 195 Atl. 62 at 68.

Second: That approximately seven people are engaged daily on the premises at 717 Grant Avenue, all of whom have free and equal access to the kitchen on the third floor, and no proof was offered of possession by appellant, whether immediate and exclusive, or otherwise.

"The general rule is that possession, to be incriminating must be personal and exclusive."

Willsman v. U. S., 286 Fed. 852 at 855.

"The court instructed the jury in effect that the burden of proving possession of the narcotics as alleged in the information rested upon the prosecution, and such possession must have been an immediate and exclusive possession and one under the dominion and control of defendant. The instructions given by the court fully and correctly stated the law upon the subject."

People v. Herbert, 59 Cal. App. 158 at 159;

People v. Sinclair, 129 Cal. App. 320 at 322.

"There is no evidence of ownership or connection with the saloon on the part of Grant or Trinkler. All of the evidence is as consistent with innocence as with guilt, and is not sufficient

to convict these defendants. Any innocent individual might have done all of the things done by Grant and Trinkler. The whole case against these defendants does not rise above suspicion." (Citing other cases and quoting from *Salinger v. U.S.,* 23 Fed. (2d) 48 at 52.)

Grant v. U.S., 49 Fed. (2d) 118-119.

Third: The evidence is as consistent with innocence as with guilt.

"In Bishop v. United States, 8 Cir., 16 F. 2d 410, 416, it is said: 'This court has often taken the position that, where the evidence in a case is as consistent with innocence as with guilt, a conviction cannot be sustained. In Grantello v. United States, 3 F. 2nd 117, 118, this court said: "Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction." ' Willsman et al. v. United States (C.C.A.), 286 F. 852; Sullivan v. United States (C.C.A.), 283 F. 865; Edwards v. United States (C.C.A.), 7 F. 2d 357."

Towbin v. United States, 93 Fed. (2d) 861 at 866;

Gunning v. Cooley, 281 U.S. 90;

Leslie v. United States, 43 Fed. (2d) 288 at 290;

Moore v. United States, 56 Fed. (2d) 794;

Linder v. United States, 268 U.S. 5.

"Evidence of facts that are as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction."

Sullivan v. United States, 283 Fed. 868;

Willsman et al. v. United States, 852 at 856.

And finally:

"In the present case there was, as there always is in a criminal prosecution, a legal presumption that appellant was innocent until proved guilty beyond a reasonable doubt. 'Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with guilt it is the duty of the appellate court to reverse the judgment against him.' (Isbell v. United States, * * * 227 Fed. 788-792.)

"In the light of the circumstances we have related, we think it impossible that a jury of reasonable men could have fairly reached the conclusion that appellant, in what he did, necessarily intended to commit rape. True enough his intent can only be determined by his acts. But on the facts shown here, the conclusion that he intended rape would be pure conjecture."

Hammond v. United States, 127 Fed. (2d) 752 at 753.

CONCLUSION.

We respectfully submit that in the light of the foregoing authorities, the judgment of conviction should be reversed as to both indictments, for the reasons hereinabove set forth.

Dated, San Francisco, California,
July 24, 1944.

Respectfully submitted,
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